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Specific Performance--Parol Contract to Convey Land

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STUDENT NOTES

SPECIFIC PERFORMANCE—PAROL CONTRACT TO CONVEY LAND.—A made an oral contract with B, whereby in consideration of her personal services to him and in consideration of her continuance of these services toward him, he would leave her his property at his death. A died intestate and B asks for a decree vesting the property in her by way of specific performance or of charging it with a trust. B, a niece of A's wife, never lived in his home, nor he in hers. She lived with her father, held a clerical position, and was married some years before A's death. She gave A a great deal of her time and companionship, but never performed personal or domestic services for him. He did not need them. The court reversed the lower court's finding for the plaintiff and *held*, B was not entitled to specific performance of the agreement made with A on the ground that she had done nothing incapable of adequate money compensation. *Simonson* v. *Mosely*, 183 Minn. 525, 237 N. W. 413 (1931).

The rule of the case is that even where an oral contract to devise property at death has been satisfactorily established, specific performance will not be decreed in absence of such performance on the part of the beneficiary as will place her in a position in which she cannot be adequately compensated in damages. But the converse of this rule is equally true, that where such contract has been clearly established and the plaintiff has performed to such an extent and in such manner that he cannot be adequately compensated in damages, specific performance will be decreed, and it has been so held in Minnesota, the jurisdiction of the principal case. *Colby* v. *Street*, 151 Minn. 25, 185 N. W. 954 (1921).

Specific performance of oral contracts to convey land on the theory that "part performance" takes the contract out of the statute of frauds, has long been dealt with by courts of equity. The doctrine of part performance was established early in English law and has been adopted in nearly all the American states. Pomeroy, Specific Performance of Contracts, 3rd. ed., sec. 96. In applying this doctrine the courts seem to run counter to the clear import of the statute, but they justify this apparent disregard on the ground that since the statute is to prevent fraud it cannot be used to perpetrate a fraud. Pomeroy aptly states the principle behind every case when he says, (*supra*, sec. 106), "if the refusal to complete the verbal contract which has been partly performed, would, within the established doctrines of equity, operate as a fraud upon the party who has done the acts, then a court of equity will compel the wrongdoer to bear the results of his bad faith, and will not suffer him to use the statute of frauds as a cover for his unjust and inequitable conduct".

In dealing with the problem two steps must be considered: first, the oral contract which must be established to the satisfaction of the court, and second, the part performance or simply, the performance, on the part of the plaintiff. Naturally both must occur before specific performance can be granted, and in addition, the second must be done pursuant to and in reliance upon the first, and must refer to it.

All cases recognizing the doctrine hold in accord that the oral contract must be established by clear, satisfactory, and convincing proof. Unless this is done, the court will go no further. *Williams* v. *Corcoran*, 346 Ill. 105, 178 N. E. 348 (1931); *Baker* v. *Fowler*, 247 N. W. 676 (Iowa 1933); *Goodwin* v. *Cornelius*, 101 Ore. 422, 200 Pac. 915 (1921); *Buck* v. *Meyer*, 195 Mo. App. 287, 190 S. W. 997 (1916).

The first step having been successfully made, the second equally essential, must be debated. Do the acts on the part of the plaintiff constitute sufficient part performance to take the contract out of the statute of frauds? These acts vary as to their nature, but where performed in pursuance to the contract established and in reliance thereon, they are sufficient if they have placed the plaintiff in a position where he cannot be adequately compensated in damages. *Cannon* v. *Cannon*, 158 Va. 12, 163 S. E. 405 (1932).

Thus specific performance was granted where the plaintiff had moved onto the promisor's place in reliance upon the agreement, and had made valuable improvements on the property without compensation. *Ellis* v. *Reagan*, 172 Ga. 181, 157 S. E. 478 (1931). Possession of property and improvements thereon by the promisee is sufficient in Michigan. *Woodworth* v. *Porter*, 224 Mich. 470, 194 N. W. 1015 (1923). Abandonment of the home place by the promisee in order to live with the promisor and keep house for him has been held part performance entitling the plaintiff to specific enforcement of the agreement. *Huse* v. *Moore*, 261 Mich. 288, 246 N. W. 123 (1931). Consideration of personal services and care given by the plaintiff to the decedent for the remainder of his life is good in Nebraska. *Weber* v. *Crabill*, 123 Neb. 88, 242 N. W. 267 (1933).

Perhaps a better way of stating the proposition is expressed by the court in *Wilcox* v. *Powell's Estate*, 206 Wis. 513, 240 N. W. 122 (1932), that where the plaintiff has performed acts of such character that "to deny them specific enforcement would operate as a fraud upon them and the prevention of fraud is the basis and reason for the equitable relief of specific performance." It is submitted that in the final analysis of the problem, this is the correct basis for granting the decree.

No matter what acts are done by the plaintiff in compliance with the agreement, if he cannot be adequately compensated at law and a refusal of specific performance would operate as a fraud upon him, equity should give relief. Conversely, whatever acts are done by the plaintiff, unless to deny him relief would cause him unjust loss and injury amounting to fraud, specific performance should not be decreed.

In short, nothing should be construed as part performance which does not put a party in a situation which is a fraud upon him unless the agreement be fully performed. *Weir* v. *Weir*, 287 Ill. 495, 122 N. E. 868 (1919). Whether the plaintiff has shown equities entitling him to relief, however, depends upon the facts of each case, and the mere fact that he does not get what he was to receive under the parol agreement is not sufficient loss or injury to constitute fraud. *Happel* v. *Happel*, 184 Minn. 377, 238 N. W. 783 (1931).

Not only is the doctrine of part performance in relation to specific performance of parol contracts followed in most states of the Union, but in some it has received sanction by statute. Such statutes are of two classes. The first recognizes the doctrine and declares nothing in the statute shall be construed to abridge it. The New York statute declares: "Nothing contained in this article abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance." Cahill's Consolidated Laws of N. Y. (1930), ch. 51, sec. 270. Similar provisions may be found in Michigan, Minnesota, Nebraska, and Wisconsin.

The second type of statute requires, in order to make a contract valid to convey land, a writing or certain specified acts of part performance in the alternative. Part performance is made a matter of legislation. See Alabama Civil Code (1923), sec. 8034-(5); Iowa Code (1931), sec. 11285-11286.

The doctrine of part performance as a basis for specific enforcement of parol contracts to devise realty is recognized and upheld in a leading U. S. Supreme court case. *Brown* v. *Sutton*, 129 U. S. 238, 9 S. Ct. 273 (1888). Clear and conclusive proof of the terms of the contract are required and a showing that compensation by damages is impossible, resulting in a fraud on the injured party. *Williams* v. *Morris*, 95 U. S. 444, 24 L. Ed. 360 (1877). Without attempting to decide what particular acts will *ipso facto* be sufficient to remove the case from the statute the rule laid down is that the acts done by the plaintiff must be of such nature that damages will be inadequate relief. *Haffner* v. *Dabrinski*, 215 U. S. 446 (1909).

The federal courts look to the law of the forum where the statute of frauds is involved and if by that law the statute is procedural, the law of the forum controls. *Levi* v. *Murrell*, 63 Fed. (2d) 670 (1933). In such event, whether specific performance will be decreed depends upon the rule of the forum. The rule as expressed by the federal courts, however, is in accord with the weight of authority that evidence to establish a parol contract to devise property must be clear, satisfactory, and convincing. *Frenzer* v. *Frenzer*, 2 Fed. (2d) 218 (1924). Mere statements of intention to devise property is not sufficient. *Faunce* v. *Woods*, 5 Fed. (2d) 753 (1925). Moreover, where the consideration for the promise is personal service or other acts done by the promisee not susceptible to money valuation, it must have been substantially re-

ceived at the promisor's death. *Jaffee* v. *Jacobson*, 48 Fed. 21 (1891), *dictum*. It is inconceivable that part performance to any less extent could be strong enough reason for taking the contract out of the statute of frauds in order to prevent fraud, but if the consideration for the agreement has been given during the life of the promisor, there is no just reason why the promisee should not have specific performance where compensation is otherwise unavailable. In this connection the test for enforceability of parol promises to devise realty as proposed by the court in *Faunce* v. *Woods* (*supra*), seems to be sound. As therein stated, the test is whether the plaintiff under the parol agreement could have prevented the decedent from disposing of the property in question during his lifetime. It is submitted that such a step could only be taken in event the plaintiff has so far performed the consideration upon which the agreement is based, that he has placed himself in a position where he will suffer irreparable injury if specific performance is refused. Equity will then grant relief on the ground of equitable fraud, upon which American courts are showing a marked tendency to rest the doctrine. See Moreland, Statute of Frauds and Part Performance, 78 U. of Pa. L. Rev. 51, 81.

The rule is denied by four states: Tennessee, Mississippi, North Carolina, and Kentucky. The North Carolina courts refuse to take the contract out of the statute even on the ground of part performance. *Ellis* v. *Ellis*, 16 N. C. 189 (1829); *Pass* v. *Brooks*, 125 N. C. 129, 34 S. E. 228 (1899). The doctrine has been repudiated as flatly inconsistent with the statute of frauds and no amount of part performance will relieve the case of its application. *Goodloe* v. *Goodloe*, 116 Tenn. 252, 92 S. W. 767 (1906).

Perhaps the most unequivocal language in opposition to the rule may be found in the early case of *Box* v. *Stanford*, 13 Smedes & M. 93, 51 Am. Dec. 142 (Miss. 1849). The argument is that the statutes are a guide for the courts as well as for the country and they have no dispensing power over them. Where they contain no exceptions the courts can make none. Therefore no exceptions of the character of part performance will be ingrafted into the statute. If the statute is too rigid and works a fraud the remedy should be by legislative enactment. This decision has been uniformly followed by the courts of Mississippi. *Washington* v. *Soria*, 73 Miss. 665, 19 So. 485 (1896); *Milan* v. *Paxton*, 160 Miss. 562, 134 So. 171 (1931).

The Kentucky rule is clearly given in *Doty's Admrs*, v. *Doty's Guardian*, 118 Ky. 204, 80 S. W. 803 (1904), that title to land cannot be acquired by a parol contract and part performance will not take the case out of the statute. This is followed by the Kentucky court wherever the question arises. *Duke's Admr.* v. *Crump*, 185 Ky. 323, 215 S. W. 41 (1919). A leading case is *Walker* v. *Dill's Admr.*, 186 Ky. 638, 218 S. W. 247 (1920), which held no acts of service or delivery of consideration on the part of the plaintiff will take the oral

contract out of the statute of frauds. Realizing, perhaps, the strictness of the rule and the resulting injustice, the court held that the party performing the services is not without a remedy, but may recover the reasonable value of his services. This holding is undoubtedly sound and does not differ from that of other jurisdictions where the pecuniary value of the services can be determined. Specific performance was refused in the principal case for this sole reason.

But where the thing done "is of such nature as not to admit of reduction to monetary value," the Kentucky cases differ greatly from the majority. The former will receive the contract for the purpose of fixing the value of those services. The latter hold, in such event, that specific performance will be granted, because if the plaintiff cannot be compensated in money the transaction will operate as a fraud upon him. If the services themselves cannot be valued in money, how can the contract put such value on them? Moreover, the services are not given for money in these cases, but in expectation of receiving property, and in many of the contracts the value of the services in money is not determined and cannot be inferred therefrom. The court held further, that where land or property is devised, it cannot in itself be recovered, but the value thereof may be paid to the plaintiff. Such recovery will not compensate the plaintiff in all cases. The objection is that in most cases the plaintiff has made the agreement for a particular piece of property, a certain home, and money value in lieu thereof will not be adequate compensation.

The Kentucky cases of parol contract to convey will allow the plaintiff to recover the "value" of what he would have received under the agreement, but in refusing to go further when the circumstances demand it, they are contra to the majority rule and the established principle of equity. If the contract is to be received for the purpose of ascertaining the "compensation" due the plaintiff thereunder, what logical reason can be advanced for refusing to consider it in the light of specific performance? The courts denying the doctrine may be holding the statute as a "shield" to keep out fraud, but under the equities involved it seems that such rule is too narrow to be just. The application of the Minnesota rule offers a better solution to the problem.

GEORGE O. ELDRED.

CENSORSHIP OF RADIO PROGRAMS AND FREEDOM OF SPEECH.—Beginning with the case of *KFKB Broadcasting Association* v. *Federal Radio Commission*, 47 Fed. (2d) 670 (1931), the eyes of contributors to legal periodicals have been focused with increasing sharpness upon those decisions of the courts which have attempted to resolve the inherent conflict between Section 11 and Section 29 of the Radio Act of 1927. (See 47 U. S. C. A., Sections 91 and 109, respectively.)

Section 11 provides: "If upon examination of any application for a station license or for the renewal or modification of a station license